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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNESTO DIAZ, JR.,

Defendant and Appellant.

G044600

(Super. Ct. No. 07CF1228)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Annie Featherman Fraser, Deputy Attorney General, for Plaintiff and Respondent.

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A jury convicted Ernesto Diaz, Jr., of second degree murder (Pen. Code, § 187, subd. (a); all statutory citations are to the Penal Code unless noted). Diaz contends the trial court prejudicially erred in defining the provocation necessary for a manslaughter conviction. The court instructed the jury that “[i]n deciding whether the provocation was sufficient, consider whether an ordinary person of average disposition would have been provoked *and how such a person would react in the same situation knowing the same facts.*” (Former CALCRIM No. 5.70 (2006 rev.), italics added.) Diaz complains the instruction required the jury to consider whether the provocation would cause a reasonable person to respond with lethal force. Diaz argues the provocation need only be sufficient to induce a reasonable person to act from emotion rather than reason. We agree the trial court’s instruction was erroneous, but conclude the error was harmless. Accordingly, we affirm the judgment.

I

FACTUAL AND PROCEDURAL HISTORY

On the afternoon of March 25, 2007, Lopers gang members Jaime Equihua and Jonny Rosales¹ were tagging gang graffiti in the area of East Pine and Maple Streets in Santa Ana. After the vandalism, Rosales went to Hugo Delacruz’s apartment because he planned to accompany Delacruz to cash a check. Diaz, also a Lopers gang member, sat outside the apartment when Rosales arrived. Sometime later, Equihua arrived with Monica Fajardo. Delacruz retrieved Diaz’s shirt from inside the apartment where he had left it earlier, and Diaz asked Rosales to hold it for him. Diaz, Equihua, and Fajardo walked to the parking lot or carport behind the apartment building to smoke crystal methamphetamine.

¹ The trial court found Rosales unavailable for the retrial and admitted his prior testimony.

About 10 minutes later, Delacruz and Rosales asked Diaz if he was joining them to cash the check. Diaz said something like “Wait. I’m coming,” and he and Equihua walked toward them. According to Rosales, “[A]ll of a sudden, [Diaz] stab[bed]” Equihua on the left side of his chest with a 10-inch folding knife he pulled from his pants pocket. Just before stabbing Equihua, Diaz said “This is for talking shit.” Equihua said, “This ain’t going to stay like this,” and walked away, but he soon collapsed and died. Diaz’s knife pierced the right ventricle of Equihua’s heart. Equihua had alcohol, methamphetamine, and marijuana in his system.

Diaz left with Delacruz and Rosales to cash the check. Along the way, Diaz cleaned off the knife and discarded it in a large green dumpster. Diaz repeatedly told his companions he “hope[d] [Equihua] die[d].” According to Rosales, Equihua was not “fucking [anybody’s] girl,” but he did “harass[] girls.”

Ana Pulido, Diaz’s former girlfriend and wife at the time of trial, testified she often saw Equihua when visiting her sister, who lived with her boyfriend Alfredo Espinoza, and his family. On one occasion in December 2006, Pulido and Equihua snorted cocaine together in the Espinozas’ garage. Equihua placed his hand on her upper thigh several times and tried to kiss her, but Pulido pushed him away, exclaiming, “What the hell are you doing?” and told him to stop. He smirked, said “sorry,” and she walked away. But the next day, the Espinoza brothers told Pulido that Equihua claimed she was “easy” and had been coming on to him. After hearing this, she slapped Equihua. At the time, Pulido dated Eric Ortiz, who was a member of rival gang Little Brook. She felt unsafe when Equihua told her on several occasions to “[b]e careful” about her associations with Little Brook and suggested she was a “Little Brook spy.”

In February 2007, Pulido, then 17 years old, rekindled a romantic relationship with Diaz, whom she had dated a few years earlier. Pulido informed Diaz about her previous problems with Equihua, but he advised her to ignore Equihua. In early March, however, their paths crossed again when Pulido visited her girlfriend. Equihua was also there, and when Pulido stepped into a large closet to retrieve clothes for her friend's baby, Equihua walked into the closet and intentionally "bumped" or pushed Pulido's shoulder. She felt awkward and was surprised by his conduct. Interpreting Equihua's conduct as disrespectful, Pulido informed Diaz about the incident. Later in March, Diaz and Pulido heard from a gang member, Little Dreamer, that Equihua was "running his mouth, and spreading [false] rumors" that Pulido was "throwing a rat," or informing the police that La Donna Espinoza, who rented a room to Pulido's sister, was selling drugs, and that Diaz was "talking bad about his own gang member friends." Diaz and Pulido confronted Equihua, who denied spreading rumors, but Pulido called him a "fucking liar" and tried to slap him. Diaz pulled her away and shook hands with Equihua.

The night before the stabbing, Pulido and Diaz argued about their relationship. She "always had a feeling he was cheating" on her. A few nights earlier he had been "hanging out" and "doing drugs" with Monica Fajardo and "Mica" (apparently also known as Micaela), who both had reputations of being "too friendly." Pulido explained she was very emotional, talking "nonsense," and "bitching about everything." She and Diaz had been using methamphetamine and marijuana for several days, and she was pregnant, though she did not know it at the time. Angry and frustrated, Pulido tried to slap Diaz, and ordered him to leave and never come back.

The morning after the stabbing, Diaz came to Pulido's home. He mentioned Equihua was "fucked," meaning dead, but she cut him off before he could say anything about the crime. Diaz appeared to be under the influence of methamphetamine, which caused him to become "cautious and quiet." She accompanied Diaz to the scene of the stabbing and testified Diaz cried when he saw a memorial to Equihua. She never heard Diaz brag about the crime or say Equihua got what he deserved. She was with Diaz when police arrested him on April 6.

On the day of the stabbing Fajardo, Delacruz's cousin, went to Delacruz's to meet her friend Micaela. Fajardo denied being in the carport with Equihua and Diaz, and claimed she first saw Equihua after he had been stabbed. He collapsed in her arms, and she summoned the ambulance. Fajardo denied being with Diaz the night before. She had two children with Lopers gang members and knew that gang members who cooperated with the police or "gave too much information" to investigators risked lethal reprisals.

"John Doe" testified he grew up in the Lopers neighborhood, helped store guns for the gang, but later became a paid federal informant. He surreptitiously videotaped a Lopers gang meeting occurring about 20 minutes after the stabbing. Diaz, Delacruz, and Rosales attended the meeting. Diaz announced that "[s]omething just went down between me and Diablo [Equihua], but it's a personal issue. It's a dead issue. It's over with now." Doe spoke with Fajardo and she admitted "she was there when Bandit [Diaz] stabbed Diablo," it was "messed up" and "shouldn't have happened," and "she was holding Diablo when he took his last breath." Doe explained calling a gang member or his girlfriend a "rat" would be "one of the biggest forms of disrespect." Doe explained

further that “there would have to be retaliation” and “[s]omeone would have to get hurt” to maintain the affronted gang member’s standing within the gang.

Diaz testified in his own defense. He resumed his relationship with Pulido though he knew she was not allowed “around the Lopers gang area” because she had dated a member of a rival gang. Pulido informed Diaz of Equihua’s unwanted sexual overtures, and Diaz believed Equihua had an interest in Pulido. Sometime after Diaz started dating Pulido again in February 2007, Equihua pulled him aside and suggested Pulido was “to blame for the Espinoza family being raided” by the police. Diaz thanked him, told him not to be concerned, and said he would look into it and handle it on his own. Diaz confirmed with Pulido, the Espinozas, and others that Pulido had nothing to do with the police raid. Nevertheless, Equihua later warned Diaz to be careful. Around the end of February, a Lopers member named Angel Fergoso told Diaz, Pulido, and Pulido’s family members that Equihua had continued to spread rumors about Pulido’s responsibility for the Espinoza raid. Diaz also learned Equihua claimed Diaz was “talking shit” about Cesar Fiero, or Big Dreamer. Diaz told Fergoso to stop spreading the rumor, and arranged a meeting with Fiero, an “OG” or older gang member, to “put the issue[s] to rest.” At the meeting, Fiero told Diaz “to not worry about it . . . [¶] . . . [¶] [b]ecause he knew me and we got along good”

Sometime after the meeting with Fiero, in March 2007, Diaz and Pulido encountered Equihua riding a bike near Halladay and Pine Streets. Diaz called Equihua over “[t]o confront him about everything that has . . . been going around that he’s been causing and to put it aside, try to settle this.” Equihua denied spreading rumors about Pulido or Diaz. Diaz stopped Pulido from slapping Equihua. At the end of the

conversation, Diaz shook Equihua's hand and "told him to not worry about it, 'let's put this aside and move on.'"

Diaz acknowledged using methamphetamine and marijuana on a regular basis, and used it with Pulido in the two days leading up to the stabbing. Diaz explained the methamphetamine made him jumpy, alert, paranoid, and cautious. He angered more easily and would "act without thinking," and "many factors and things start popping up in my head. Emotions. . . . I can't control it. I don't know what to concentrate on" He described the effect as "brain-wrecking."

On March 24, Diaz argued with Pulido after she accused him of not taking her seriously and being unfaithful with Fajardo and Micaela. He denied the accusation and stated he wanted to settle down with her, but she kicked him out of the house. Although he knew Pulido's home pregnancy tests were negative, he suspected she might be pregnant based on her emotions and his experiences watching his mother behave during her pregnancy. Diaz felt sad and disappointed, and worried he "wasn't going to be able to take part in my son's life"

After he left Pulido, he walked through the Lopers' neighborhood and encountered Fajardo and Micaela. He told Fajardo what happened, and she told him not to be "bum[m]ed out" because Pulido was a "Ho," a "Rat," and a "Brook Street spy." He ingested more methamphetamine with the women, staying with them through the evening and into early morning. Diaz did not sleep. He decided to go to Delacruz's house to tell him about his fight with Pulido. After hearing about Diaz's troubles, Delacruz said he could "hang around" for a while. Diaz got comfortable and removed his outer shirt because he "didn't feel like wearing it."

Later that afternoon, as Delacruz and he prepared to leave, Delacruz retrieved Diaz's shirt, but Diaz asked Rosales to hold it for him. Diaz saw Fajardo and Equihua arrive through the back carport area. He "was ready to greet 'em," but they stopped and walked back towards the carport. He followed to see if any of his other friends were back there. He greeted Fajardo and said hello to Equihua. Equihua, who appeared "a little uptight" in a "stance [that] was like ready to strike," replied, "What the fuck are you doing?" Diaz asked, "What do you mean?" Equihua responded by asking why Diaz was "still going around" with Pulido, and if Diaz knew "she was a rat" and a "whore" who informed on the Espinoza family. Equihua said Pulido was "only trying to set [Diaz] up" and Equihua could "get her anytime he wants."

Diaz, still "brain-wreck[ed]" from the methamphetamine, "snapped" and stabbed Equihua. He did not recall details of the stabbing, nor did he recall where he got the folding knife, although he often carried a knife to cut roses for Pulido. Diaz admitted he discarded the knife in a dumpster, but denied wiping it down. He denied intending to kill Equihua.

Interviewed by the police after his arrest April 6, Diaz denied involvement and stated Equihua had done nothing to him. On cross-examination, Diaz admitted "respect is a big deal" for him. According to Diaz, Equihua "disrespected" Pulido and him repeatedly. Diaz also feared other Lopers might harm him based on Equihua's rumor-mongering. He denied taking off his shirt because he planned to stab Equihua, or knowing that Equihua would arrive at Delacruz's residence with Fajardo.

Following a trial in May 2010, a jury convicted Diaz as noted above. In December 2010, the trial court sentenced Diaz to a term of 15 years to life in prison.

II

DISCUSSION

The Court Did Not Prejudicially Err in Instructing on Heat of Passion Manslaughter with the 2006 Version of CALCRIM No. 570

Diaz contends the trial court erroneously instructed the jury with the 2006 version of CALCRIM No. 570, which covers the nature of the provocation necessary to reduce murder to voluntary manslaughter where the killing occurs in the heat of passion.² The court instructed, without objection,³ that:

“A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.

“The defendant killed someone because of a sudden quarrel or in the heat of passion if:

“1. The defendant was provoked;

“2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his [or her] reasoning or judgment;

“AND

² The California Supreme Court has granted review in another case to consider whether a trial court misinstructed with former CALCRIM No. 570. (*People v. Beltran*, review granted June 15, 2011, S192644.)

³ The case was tried twice. At the first trial in November 2009, the trial court instructed with the current (Dec. 2008 rev.) version of CALCRIM No. 570. The jury deadlocked 8-4 in favor of murder over manslaughter. At the May 2010 retrial, the trial court inexplicably instructed with former CALCRIM No. 570.

“3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

“Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

“In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

“It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his or her own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked *and how such a person would react in the same situation knowing the same facts.*

“ If enough time passed between the provocation and the killing for a person of average disposition to ‘cool off’ and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.

“The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder.” (Italics added.)

The Attorney General argues Diaz forfeited his claim by failing to object to CALCRIM No. 570 in the trial court. We disagree. “Upon an appeal taken by the defendant, . . . [t]he appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.” (Pen. Code, § 1259.) The instruction defining voluntary manslaughter and heat of passion affected Diaz’s substantial rights. The Attorney General also faults Diaz for failing to request modifying or clarifying language. A defendant has a duty to request more precise language where the instruction is “‘too general or incomplete.’” (*People v. Coddington* (2000) 23 Cal.4th 529, 584.) Diaz contends, however, the instruction misstated the law. A defendant’s obligation to ask for clarifying instructions “does not apply when . . . the trial court gives an instruction that is an incorrect statement of the law.” (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012.) We therefore must consider the merits of Diaz’s claim.

In *People v. Najera* (2006) 138 Cal.App.4th 212, we explained, “An unlawful homicide is upon ‘a sudden quarrel or heat of passion’ if the killer’s reason was obscured by a “‘provocation’” sufficient to cause an ordinary person of average disposition to act rashly and without deliberation. [Citation.] The focus is on the provocation — the surrounding circumstances — and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion.”

(*Id.* at p. 223.) In *Najera*, the prosecutor misstated the law in arguing heat of passion should be based on the reasonableness of defendant’s conduct or response: “Would a reasonable person do what the defendant did? . . . [¶] ‘[T]he reasonable, prudent person standard . . . [is] based on conduct, what a reasonable person would do in a similar circumstance. Pull out a knife and stab him? I hope that’s not a reasonable person standard.’” (*Ibid.*)

We nevertheless affirmed the conviction because evidence the victim called the defendant a “faggot” was legally insufficient to warrant a voluntary manslaughter instruction because that epithet would not “cause an ordinary person to lose reason and judgment under an objective standard.” (*Najera, supra*, 138 Cal.App.4th at p. 226; see *People v. Breverman* (1998) 19 Cal.4th 142, 163 (*Breverman*); see also *People v. Logan* (1917) 175 Cal. 45, 49 [provocation may be anything that would arouse great fear, anger, or jealousy].) Consequently, we declined to address whether the trial court’s instruction correctly described the provocation necessary for the jury to return a voluntary manslaughter verdict. (*Najera*, at p. 226.)

The Judicial Council, however, addressed the issue when it modified CALCRIM No. 570 in December 2008 following a recommendation from the Advisory Committee on Criminal Jury Instructions “because of concern that the original draft [of CALCRIM No. 570] could raise a doubt in a juror’s mind about whether the state of mind required for voluntary manslaughter was that an average person similarly situated would have been provoked to kill, or whether provocation resulting in passion rather than judgment was sufficient.” (Judicial Council of Cal., Advisory Com. on Crim. Jury Instns. Rep. (Oct. 10, 2008) p. 2, available online at <<http://www.courts.ca.gov/documents/120908item5.pdf>> [as of Oct. 31, 2012].) The

revised version clarified the state of mind required was “the latter” (*Ibid.*)

Revised CALCRIM No. 570 states, in pertinent part: “In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.”

Here, the trial court instructed the jury in deciding whether the provocation was sufficient to “consider . . . *how [an ordinary person of average disposition] would react in the same situation knowing the same facts.*” This portion of the instruction arguably invited the jury to consider the reasonableness of Diaz’s response to the asserted provocation, which *Najera* and the cases it cites have held is not relevant in determining whether the provocation would cause an ordinary person of average disposition to act rashly. Malice is negated by “strong passion” sufficient to cause an ordinary person of average disposition to act rashly and without reflection. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.) The instruction here allowed the jury to consider whether a defendant’s conduct was a reasonable response to the provocation. The law, however, focuses on whether a reasonable person would succumb to the provocation, not on whether the homicidal act was reasonable. By definition, a voluntary manslaughter can never be a reasoned response to provocation. We therefore agree with Diaz the court erred by instructing the jury with this language.

We review the instructional error here under the test formulated in *People v. Watson* (1956) 46 Cal.2d 818, 836. Thus, we may reverse “only if, ‘after an examination of the entire cause, including the evidence’ [citation], it appears ‘reasonably probable’ the defendant would have obtained a more favorable outcome had the error not occurred. [Citation.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) We therefore

“may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.” (*Id.* at p. 177.)

Diaz argues the instructional error was prejudicial because he presented “substantial evidence that he stabbed Equihua in the heat of passion” He argues Equihua provoked him in the following manner: (1) Equihua’s “sexually assaultive behavior” degraded Pulido; (2) Equihua, according to Diaz’s testimony, “called her a whore [and] easy to get”; (3) Equihua undermined Diaz’s position in the gang and his relationship with Pulido by spreading rumors Pulido was a police informant and spy for a rival gang; and (4) at the time of the stabbing Equihua took a fighting stance and asked Diaz, “What the fuck are you doing?” Diaz also urges “the prejudicial effect of the error was exacerbated by the prosecution’s [erroneous] closing argument,” where he stated “a person of average disposition would not have stabbed another individual for making statements about their girlfriend” and repeated the portion of CALCRIM No. 570 that Diaz now challenges on appeal.

We conclude the instructional error here does not require reversal because it is not reasonably probable Diaz would have obtained a better result absent the error. Overwhelming evidence supports the second degree murder verdict. The evidence that Equihua provoked Diaz was weak. Indeed, the evidence suggests a premeditated attack more than it does a rash act after a sudden quarrel or in response to provocative statements. Rosales, a fellow gang member who had no ulterior motive to give false evidence, testified the stabbing occurred “suddenly” and without warning as Diaz and Equihua returned from the carport area. Diaz, armed with a knife, declined to put his

shirt back on and asked Rosales to hold it, presumably so there would be no hindrance when he wielded the knife at his victim. Diaz claimed Equihua confronted him and slandered Pulido, but Rosales did not testify Equihua exchanged words with Diaz before the stabbing, nor did he testify Equihua took a fighting stance. True, Diaz was dejected over his argument with Pulido and his eviction from her home, but Diaz's own depressed mental state cannot establish the element of provocation, which must come from the victim. (*People v. Carasi, supra*, 44 Cal.4th at p. 1306 [“victim must taunt the defendant or otherwise initiate the provocation”]; *In re Thomas C.* (1986) 183 Cal.App.3d 786, 798 [defendant's depressed mental state does not constitute provocation].)

Likewise, there was little evidence Diaz actually stabbed Equihua in the heat of passion. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252 [provocation and heat of passion must be affirmatively shown].) Rosales did not describe Diaz as appearing emotional or in a rage at the time of the stabbing. Diaz did not lash out in a frenzy, but rather ambushed Equihua, inflicting a single stab wound to the chest. After the stabbing, Diaz explained he stabbed Equihua for “talking shit,” and he, Delacruz, and Rosales made their way to a gang meeting where Diaz reported, “Something just went down between me and Diablo [Equihua], but it's a personal issue. It's a dead issue. It's over with now.” He announced to others he hoped Equihua would die. (See, e.g., *People v. Burden* (1977) 72 Cal.App.3d 603, 620–621 [“A defendant's lack of concern as to whether the victim lived or died, expressed or implied, has been found to be substantial evidence of an ‘abandoned and malignant heart’ by the appellate courts of this state”]; *People v. Ogg* (1958) 159 Cal.App.2d 38, 51 [“Defendant's failure to seek the assistance of his friends or to obtain medical aid even though he knew that his wife was seriously injured indicates a heartless attitude and callous indifference toward her”].)

The provocation evidence derived almost exclusively from the testimony of Diaz and Pulido. But Diaz undermined his credibility by his failure to recall the circumstances of the stabbing, giving no evidence of how and when he acquired the knife, or how he removed and used the knife. This contrasted with a detailed account of alleged run-ins with Equihua and other events occurring before and after the stabbing. Moreover, according to Diaz and Pulido, Equihua denied spreading rumors about Pulido when they confronted him. Consequently, the jury would have found it unlikely Equihua would have uttered the identical comments to Diaz he denied making to him earlier, or that Diaz would “snap” after hearing the same rumors he had heard numerous times before and handled with equanimity.

Indeed, Diaz’s provocation evidence provided a strong motive to assault and even to kill Equihua. As Doe explained, calling a gang member or his girlfriend a “rat” would be “one of the biggest forms of disrespect” and “there would have to be retaliation.” For Diaz to maintain standing within the gang, “[s]omeone would have to get hurt.” Equihua’s sexual interest in Pulido provided yet more fuel for Diaz to extract revenge.

Finally and most significantly, Diaz’s provocation evidence was insufficient to cause *a person of average disposition* to act rashly, from passion rather than from judgment. The yardstick is not how an average *gang member* would react. Diaz was not entitled to set up his own standard of conduct. Diaz’s emotions and passion stemming from gang sensibilities do not fall within the category of provocation typically found by society and juries to excuse murder. (See *People v. Berry* (1976) 18 Cal.3d 509, 515 [victim taunted the defendant about her adultery and possible pregnancy by another man, and also sexually aroused but then frustrated the defendant];

People v Borchers (1958) 50 Cal.2d 321, 328–329 [infidelity of a lover];
People v. Elmore (1914) 167 Cal. 205, 211 [killing after an assault by victim causing the defendant substantial pain or injury]; *People v. Brooks* (1986) 185 Cal.App.3d 687, 693 [belief the victim killed a member of the defendant’s family].) To reduce a killing from murder to manslaughter, the defendant must show he or she acted under the heat of passion caused by provocation sufficient to arouse the passion of an ““ordinary reasonable person under the given facts and circumstances,” because “no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless . . . the facts and circumstances were sufficient to arouse the passions of the ordinary reasonable man.” [Citation.]’ [Citations.]”
(*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

In *People v. Avila* (2009) 46 Cal.4th 680, 706, the court held that hearing a person shout possible gang references or a challenge would not cause an ordinarily reasonable person to become homicidally enraged. Diaz’s alleged passion in this case was not that of a reasonable person of average disposition; rather, it was the reaction of a gang member. (See *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1415 [defendant who killed his estranged wife and her lover reacted not as a reasonable person but as an obsessed stalker].)

Based on our review of the record and for the reasons provided above, we conclude the trial court’s error in instructing with former CALCRIM No. 570 did not prejudice Diaz.⁴

⁴ We disagree with Diaz’s claim the error is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18. *Chapman* applies where the erroneous instruction *omits* an element of an offense. (*People v. Gonzalez* (2012) 54 Cal.4th 643, 663.) But even under the *Chapman* standard, we would find the error

III

DISPOSITION

The judgment is affirmed.

ARONSON, J., ACTING P.J.

WE CONCUR:

FYBEL, J.

IKOLA, J.

harmless. It is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. (*Ibid.*)

Additionally, no evidence suggests the concepts addressed by CALCRIM No. 570 contributed to the prior jury's inability to reach a verdict. (See *People v. Andrews* (1989) 49 Cal.3d 200, 211, fn. 5 [rejecting prejudice argument erroneously admitted statement may have played a role in previous jury's inability to reach a verdict, noting other significant differences between trials].) Jury questions at the first trial suggest the jury sought clarification of the meaning of implied malice.